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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

PAMELA HOWARD and MARK HOWARD,
wife and husband,

Plaintiffs,

vs.

WILD WATERS, L.L.C.,

Defendant.

Case No. **CV 2004 5937**

**MEMORANDUM OPINION AND ORDER
DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT ON
PLAINTIFFS' CLAIMS OF NEGLIGENT
MAINTENANCE AND NEGLIGENT
OPERATION**

I. BACKGROUND.

This matter came before the Court on October 27, 2005, on oral argument for Defendant's Motion for Summary Judgment. Summary Judgment was granted in favor of defendant on plaintiffs' claims of negligent employment, negligent training and negligent supervision. The Court took under advisement defendant's motion for summary judgment on plaintiffs' claims of negligent operation and negligent maintenance. Additional briefing by both parties was invited by the Court. Only defendant filed its brief on November 15, 2005. Accordingly, the matter is now at issue.

This case involves an August 22, 2002, accident causing injury to plaintiff Pamela Howard at defendant Wild Waters, L.L.C. water park in Coeur d'Alene. Pamela Howard was injured when her husband plaintiff Mark Howard hit her from behind coming down on the slide. Complaint, p. 3, ¶ 4. The claim of negligent operation is that the lifeguard sent

Mark Howard down too soon. *Id.* The claim of negligent maintenance is that a portion of the slide was rough, causing Pamela Howard to slow down. *Id.*

II. NEGLIGENT MAINTENANCE.

The complaint makes the claim that a portion of the slide was rough, causing Pamela Howard to slow down. Complaint, p. 3, ¶ 4. On this issue, Pamela Howard testified consistently in her deposition. Affidavit of Jennifer L. Gorman, Exhibit A, pp. 62, 65, 66, 68. Wild Waters claims they maintained the slide properly. Affidavit of Chris Gage. There is a dispute of fact on this issue. Summary judgment is not appropriate on the negligent maintenance theory. It is up to a jury whom to believe.

III. NEGLIGENT OPERATION.

A. Extent of the Duty.

The elements of a cause of action for negligence are familiar. They consist of a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; a breach of the duty; a causal connection between the defendant's conduct and the plaintiff's injuries; and actual loss or damage flowing from those injuries.

Heath v. Honkers' Mini-Mart, Inc., 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct.App. 2000), citing *Coughlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 210 (1999).

The focus of defendant's motion for summary judgment on the issue of negligent operation, is on the nature and scope of the duty owed by Wild Waters to the Howards and whether there was a breach of that duty. Memorandum in Support of Motion for Summary Judgment, p. 3. The slide that was involved is 472 feet in length. Affidavit of Charles R. Haines, p. 4, ¶ 6. Wild Waters contends that their expert, Charles R. Haines, sets forth the duty as established by industry standard, that being that when a water slide is over 150

feet in length it is acceptable to let the next patron go down the slide when the patron already on the slide has reached the $\frac{3}{4}$ mark on the slide. Howards have offered no proof or argument to a contrary standard. The court is to decide if a duty is owed and the scope or extent of the duty. *Kessler v. Barowsky*, 129 Idaho 640, 643, 931 P.2d 634, 637 (Ct.App. 1996). In the absence of a statute, courts define the duty based, in part, on the standards in the particular industry. "Evidence of the custom and practice of persons engaged in a trade or business similar to the trade or business of a party to a negligence suit is admissible and probative in regard to the requisite standard of care." Memorandum in Support of Defendant's Motion for Summary Judgment, p. 4, *citing* Am.Jur.2d *Negligence* § 164. While Haines' expert opinion is uncontradicted, it is not determinative upon this Court. The industry standard is probative on the issue of duty, but it is not determinative. For the purposes of this summary judgment only, the Court accepts the $\frac{3}{4}$ mark as the duty owed to a patron of a water slide in excess of 150 feet in length before the water park employee allows the next patron to go down the slide.

B. Breach of Duty.

Assuming for the purpose of this summary judgment motion that this Court at trial adopts the industry standard put forth by Haines, defendants are not entitled to summary judgment on plaintiffs' causes of action under negligent operation. Wild Waters claims in "Defendant's Statement of Material Facts":

As the Plaintiff Pamela Howard went down the slide, she claimed she began to slow down at a location on the slide that was just prior to or at or about the designated "mark," or $\frac{3}{4}$ point on the slide. (citing Pamela Howard's deposition taken March 28, 2005). In fact, at her deposition said Plaintiff indicated on an overhead picture of the slide that point where she began to slow.

Defendant's Statement of Material Facts, p. 2. However, a thorough reading of the

excerpts of Pamela Howard's deposition transcript that was attached to defendant's attorney Jennifer L. Gorman's Affidavit, does not support this claim. Part of the problem is the Gorman Affidavit attaches only certain pages of Pamela Howard's deposition transcript. But in reading those pages which have been furnished, at no point can the Court determine what Pamela Howard was referring to when she drew on Exhibit 4 to her deposition. There may be inconsistency between Pamela Howard's deposition testimony and her affidavit if her whole transcript were read, but this Court has not been furnished her entire transcript. This Court is unable to determine the extent of any claimed inconsistency because all the Court has been favored with are certain pages of Pamela Howard's deposition transcript. Those limited pages do not establish an inconsistency between her deposition and her affidavit. Defendant's expert Charles R. Haines does not state whether the point Pamela Howard drew on the photograph of the slide in her deposition is before, after or at the $\frac{3}{4}$ mark.

In Pamela Howard's Affidavit which she signed on October 15, 2005, she claims that in her March 28, 2005 deposition, she stated that she was approximately halfway down the slide when she started slowing down and, upon speeding up, heard a whistle blow. Affidavit of Pamela Howard, p. 1. She went on to state in her affidavit: "It is my belief that I was about halfway down the slide at that time that happened [that I nearly stopped], and that I was just past halfway down the slide when I heard the whistle. Assuming there can be a bright line demarking duty at the $\frac{3}{4}$ mark, if she was above that line when the whistle blew, there was a breach of the duty owed to Pamela Howard by defendant's agents.

Wild Waters claims this affidavit violates the rule that "...a party may not be permitted to raise conflicting inferences through the affidavits of hew own witnesses, or in

this case, herself. See *Heath v. Honker's Mini-Mart, Inc.*, 8 P.3d 1254, 1257 (Idaho Ct. App. 200); and, see *Tolmie Farms, inc. v. J. R. Simplot Co., Inc.*, 124 Idaho 613, 617, 862 P.2d 305, 309 (Idaho App. 1992). The Court has read those cases and the more recent case of *Stanley v. Lennox Industries, Inc.*, 140 Idaho 785, 102 P.3d 1104 (2005). As set forth above, based on what has been presented to the Court, the defendants have not shown Pamela Howard has created conflicting facts or inferences.

Even if she were inconsistent between her deposition and affidavit, in the worst case scenario from her standpoint, she is very near the $\frac{3}{4}$ mark. The Court must keep in mind that it is not the worst case, but the best case from her standpoint which the Court must apply at this point. The Court must construe all facts liberally in favor of the party opposing the motion and must give the non-moving party the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). If that $\frac{3}{4}$ mark is the delineation point of the duty, it is up to the trier of fact, in this case a jury, to determine if she was before, at or beyond that point when the whistle blew. Pamela Howard is not clear that she even heard the whistle for this particular slide, so her marking a spot on a photograph of the slide in her deposition that is at or near the $\frac{3}{4}$ mark is not determinative of the breach of duty.

Because there is a dispute of fact as to where Pamela Howard was when the whistle blew to allow Mark Howard to proceed down the slide, the Court cannot grant summary judgment in favor of the defendant on plaintiffs' claim of negligent operation. Pamela Howard has set forth evidence in her affidavit which, if believed by a jury, could establish a breach of the duty established by Wild Waters' expert Charles R. Haines. Accordingly, summary judgment is not appropriate on the negligent operation claim.

What portions of Pamela Howard's deposition transcript that have been furnished to

the Court do not establish a directly contradictory statement by Pamela Howard.

As an aside, at oral argument plaintiffs' counsel argued that Mark Howard waited an additional ten seconds before he began his descent down the slide, following his wife.

That claim finds no support, at least in the record submitted to the Court.

IV. ORDER.

IT IS HEREBY ORDERED that defendant' motion for summary judgment on plaintiffs' claims of negligent maintenance and negligent operation, are DENIED.

Entered this 5th day of December, 2005.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2005, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
Gary I. Amendola

Fax #
765-1046

| Lawyer
Michael I. Haman

Fax #
664-5380

Secretary